

FILED
Court of Appeals
Division II
State of Washington
7/25/2018 1:04 PM
NO. 51321-8

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ERIC SANDERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth P. Martin

No. 17-1-01608-1

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State adduced sufficient evidence for the trier of fact to find the defendant guilty of the crime of vehicular assault when the defendant reversed into P.L.'s vehicle at 40 mph giving her a concussion, memory loss and soreness lasting for months?
2. Whether defendant has failed to show prosecutorial error occurred when none of the prosecutor's arguments during closing were improper, let alone flagrant and ill-intentioned?
3. Whether the defendant fails to demonstrate ineffective assistance of counsel where he fails to satisfy either prong of the *Strickland* test?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On April 24, 2017, the State charged Eric Sanders, hereinafter referred to as the "defendant" with one count of assault in the second degree (Count I), one count of felony harassment (Count II) and one count of attempted to elude a pursuing police vehicle (Count III). CP 4-6. The State filed an amended information on July 20, 2017 adding the following charges: failure to remain at injury accident (Count IV), interfering with the reporting of domestic violence (Count V) and vehicular assault (Count VI). CP 8-11.

Jury trial began on August 23, 2017. 3RP 35¹. Trial was held before the honorable Judge Elizabeth Martin. 3RP 35. The jury found defendant guilty beyond a reasonable doubt of assault in the fourth degree (the lesser included offense for count 1), attempting to elude a pursuing police vehicle (count III), hit and run (count IV) and vehicular assault (count VI). CP 66-77. The defendant was found not guilty of assault in the second degree (count I), felony harassment (count II) and interfering with the reporting of domestic violence (count V). CP 66-77.

On September 22, 2017, the court sentenced the defendant to the high end of the standard range on all counts, all to run concurrently with the exception of count I, assault in the fourth degree, running consecutively for a total of approximately 85 months in custody. CP 115-119, 7RP 461. The court also sentenced the defendant to \$1800 in legal financial obligations and to have no contact with Ms. Wetter. CP 115-119, 7RP 461.

Defendant timely filed a Notice of Appeal. CP 128-140.

¹ There are seven volumes of the verbatim report of proceedings. The State will refer to each volume as follows: 1RP for Sanders Vol 1, 2RP for Sanders Vol 2, 3RP for Sanders Vol 3, 4RP for Sanders Vol 4, 5RP for Sanders Vol 5, 6RP for Sanders Vol 6, 7RP for Sanders Vol 7.

2. FACTS

On April 22, 2017, Megan Wetter and the defendant got into an argument after he brought his children to her house to play with her children. 3RP 87. The argument started because the defendant asked Ms. Wetter for the time, but ignored her response. 3RP 88. Ms. Wetter asked, "Oh, did you hear me?" 3RP 88. The defendant said "Yes, I F-ing heard you." 3RP 88. The defendant asked Ms. Wetter to leave her three-week-old baby, whom he believed was their child in common, with him while she went to look at a car. 3RP 85-88. Wetter wanted to take the baby with her because the defendant had never been left alone with the baby. 3RP 88. As Ms. Wetter went to pick the baby up, the defendant pushed her away and told her she was not going to take the baby. 3RP 88. Their argument led into the hallway. 3RP 89.

The defendant choked Ms. Wetter's throat with this hands. 3RP 89-90. As the defendant attacked Ms. Wetter, Ms. Wetter's 11-year-old daughter brought the baby and the defendant's daughter into the living room to get away from the violence. 3RP 89. The defendant followed Ms. Wetter into the living room where all the kids were. 3RP 89. Ms. Wetter raced the defendant to the living room for the baby as he snatched the baby from her daughter. 3RP 104. The defendant fought the phone away from Ms. Wetter as she tried to call 911. 3RP 104.

Ms. Wetter sustained multiple injuries from the attack. 3RP 105. She had marks around her neck and scratches on her hands and wrists. 3RP 105. Ms. Wetter left her house and waited for the defendant to calm down before returning. 3RP 105-106. However, when Ms. Wetter returned the defendant left with the baby. 3RP 106. Ms. Wetter called the defendant and threatened to call 911 if he did not immediately bring the baby back. 3RP 105-106. The defendant left and purchased a large amount of baby supplies as if he was taking the baby without any intention of returning. 3RP 107-108. He had everything from cans of formula to wipes and diapers. 3RP 107-108. The baby was laid sideways in his car without a car seat. 3RP 106.

Ms. Wetter confronted the defendant about taking the baby. 3RP 106. Ms. Wetter told the children to go inside as the defendant began to argue with her again. 3RP 107. Ms. Wetter threatened to write the defendant's license plate down so he couldn't take the baby again. 3RP 106-107. The defendant kicked Ms. Wetter's phone out of her hands so she couldn't write his license plate down, breaking the phone. 3RP 107.

Ms. Wetter screamed for her neighbors to call the police. 3RP 107. Two Tacoma Police Department (TPD) officers including Officer Bennett responded to this incident. 3RP 107, 128-129. Several neighbors pointed the defendant out to officers as they arrived. 3RP 129-130. When he saw

TPD arrive, the defendant threw the baby gear back in his Dodge Charger and reversed down the alley at 40 mph away from Officer Bennett. 3RP 107-108, 4RP 211-213. The defendant drove toward his neighbor, Buddy Horton. 4RP 207-209. Officer Bennett pursued the defendant. 3RP 109.

As he fled from officers, the defendant struck a 2016 Chevy Silverado pickup truck at a perfectly perpendicular angle so hard that all of the airbags deployed and pushed it off of the road onto a grass parking strip. 3RP 132-135, 4RP 168, 185. Inside the truck were Mr. Van Brocklin and his granddaughter, P.L.² 3RP 135, 4RP 154, 185. P.L. watched as the defendant struck her vehicle. 4RP 157. She lost consciousness and woke up smelling what she thought was a fire and heard OnStar telling her she was in a collision. 4RP 157. P.L. crawled over the center console and out of the vehicle. 4RP 157-158. P.L. suffered a concussion and post concussive syndrome. 4RP 162, 223. Following the accident, P.L. also suffered from soreness, headaches and migraines. 4RP 160. She missed school for nearly three months. 4RP 164. P.L. continued to suffer from headaches and memory issues as a result of the accident. 4RP 166.

Mr. Van Brocklin also lost consciousness when the defendant struck his vehicle. 4RP 186. His lungs and face felt like they were burning

² Because the victim is a minor, the State will refer to her by her initials. The State means no disrespect.

as the truck filled with smoke. 4RP 188. Mr. Van Brocklin suffered from nerve damage throughout his body which made it hurt to sit. 4RP 189.

The defendant continued to flee from officers after striking Mr. Van Brocklin and P.L. 3RP 138. The defendant drove upwards of 80 miles an hour to elude officers. 3RP 139. He drove through at least two red lights, multiple stop signs, and through Pearl Street, which is always busy. 3RP 140, 142. The defendant nearly collided with several vehicles as he eluded police officers. 3RP 140. Several people who he nearly collided with pulled off to the side of the road and pointed the defendant out to officers. 3RP 140.

Officers found the defendant off of Vance Street. 4RP 138-139. Tacoma Police officer Flippo arrested the defendant after he ditched his car and attempted to flee on foot. 5RP 272-274, 282. The defendant tried to hide his vehicle behind a golf course maintenance building. 5RP 283. The defendant's vehicle had extensive body damage consisting of, but not limited to, a shattered rear window, missing bumper, and other body damage. 5RP 283. The defendant even changed his clothes before ditching the vehicle. 5RP 319. The defendant told officer Flippo that he saw the police coming, but left anyway because he didn't think he did anything wrong. 5RP 275. When asked if he hit anything with his car, the defendant

said he thought he hit a pole, but wouldn't admit to hitting Mr. Van Brocklin and P.L.'s vehicle. 5RP 275.

C. ARGUMENT.

1. THE EVIDENCE WAS SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED VEHICULAR ASSAULT WHEN THE DEFENDANT RAMMED INTO P.L.'S VEHICLE IN REVERSE AT 40 MPH GIVING HER A CONCUSSION RESULTING IN HEADACHES, SORENESS, AND MEMORY LOSS LASTING FOR MONTHS.

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Verdicts "in either criminal or civil cases may be based entirely upon circumstantial evidence." *State v. Evans*, 32 Wn.2d 278, 280, 201 P.2d 513 (1949).

"Credibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Conflicting evidence is judged solely by the jury. *Welliever v. MacNulty*, 50 Wn.2d 224, 310 P.2d 531 (1957). Therefore, when the State

has produced evidence of all the elements of a crime, the decision of the jury should be upheld. *Camarillo*, 115 Wn.2d at 71.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Camarillo*, 115 Wn.2d at 71. (*Citing State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from conduct where "it is plainly indicated as a matter of logical probability." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

In order to convict the defendant of the crime of vehicular assault as charged in count VI, the State was required to prove the following elements beyond a reasonable doubt:

- 1) That on or about April 22, 2017, the defendant drove a vehicle;
- 2) That the defendant's driving proximately caused substantial bodily harm to another person;
- 3) That at the time the defendant:
 - a. Drove the vehicle in a reckless manner; or
 - b. Drove the vehicle with a disregard for the safety of others; and
- 4) That this act occurred in the State of Washington.

CP 25-65 (Court's Instructions to the Jury No. 35)

The record reflects that the State proved beyond a reasonable doubt that the defendant committed the crime of vehicular assault. The defendant was driving. Ms. Wetter and Officer Bennett testified that the defendant fled from the police in his Dodge Charger. 3RP 107-108, 4RP 211-213.

The defendant's driving caused substantial bodily harm where P.L. suffered from a concussion. Dr. Hurley diagnosed P.L. with a concussion and post concussive syndrome. 4RP 162, 223. P.L. also suffered from soreness, headache, and a migraine causing her to miss school for nearly three months. 4RP 160-164. P.L. continued to suffer from headaches and memory issues as a result of the accident. 4RP 166.

The defendant drove recklessly with a disregard for the safety of others. The defendant drove upwards of 80 miles an hour to elude officers. 3RP 139. He drove through at least two red lights, multiple stop signs and

through Pearl Street, a busy road. 3RP 140, 142. The defendant nearly collided with several vehicles as he eluded officers. 3RP 140. Several people who he nearly collided with pulled off to the side of the road. 3RP 140.

The defendant stuck P.L.'s vehicle in the State of Washington. Officer Bennet testified that the defendant rammed into P.L.'s vehicle near Wilson High School which is in the State of Washington. 3RP 132.

Defendant claims that the evidence to prove count VI vehicular assault is insufficient because there was no evidence of substantial bodily harm. Brief of Appellant at 22. This claim fails as P.L. suffered from a concussion as a result of the vehicular assault. In *McKague*, the Washington State Supreme Court held that a concussion is sufficient to allow a jury to find that a victim suffered a temporary but substantial impairment of a body part or an organ's function, as required for substantial bodily harm. 172 Wn.2d, 806-807, 262 P.3d 1225 (2011). Therefore, in viewing the evidence in the light most favorable to the State, the record was sufficient for the jury to find that the defendant committed the crime of vehicular assault where the defendant rammed into P.L.'s vehicle at approximately 40 mph giving her a concussion and post concussive symptoms that lasted for months. As such, this Court should dismiss the defendant's claim and affirm his conviction.

2. DEFENDANT FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR³ OR THAT ANY UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

To prove that a prosecutor's actions constitute error, a defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (citing *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009)).

The defendant has the burden of establishing that the alleged error is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718,

³ “‘Prosecutorial misconduct’ is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand can undermine the public's confidence in the criminal justice system, both the National District Attorney's Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase “Prosecutorial misconduct” for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf (last visited June 28, 2016). National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10, 2010). http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited June 28, 2016). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase “prosecutorial error.” The State urges this court to use the same phrase in its opinions.

940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the error does not constitute prejudice unless the appellate court determines there is a substantial likelihood the error affected the jury's verdict. *Id.* at 718-19. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Juries are presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *Russell*, 125 Wn.2d at 86. The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Id.* at 87.

A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) *cert. denied*, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009); *Stenson*, 132 Wn.2d at 727. An error only arises if the prosecutor clearly expresses a personal opinion as to the credibility of a witness instead of arguing an inference from the evidence. *Warren*, 165 Wn.2d at 30. A prosecutor may not make statements that are unsupported by the evidence or invite jurors to decide a case based on emotional appeals to their passion or prejudices. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993). However, a prosecutor may also argue credibility of witnesses. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (a prosecutor may draw an inference from the evidence as to why the jury would want to believe a witness).

Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). “Under this heightened standard, the defendant must show that (1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the [error] resulted in prejudice that ‘had a

substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *Thorgerson*, 172 Wn.2d at 455).

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); see also *State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011). “Accordingly, reviewing courts focus less on whether the prosecutor’s [error] was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured by an instruction.” *State v. Smiley*, 195 Wn. App. 185, 195, 379 P.3d 149 (2016).

In this case, defendant claims the State committed reversible error during closing arguments by misstating the law and minimizing the burden of proof. Brief of Appellant at 10 and 14. Defendant failed to object to any of the alleged error during trial. For the reasons set forth below, defendant fails to demonstrate that the prosecutor’s actions were improper or flagrant and ill-intentioned. Defendant’s claim of prosecutorial error accordingly fails.

- a. The defendant fails to meet his burden of showing prosecutorial error where the State's argument that P.L.'s concussion constitutes substantial bodily harm was both an accurate reflection of the law and properly made in response to defense counsel's argument.

A prosecutor is allowed to argue that the evidence does not support a defense theory. *Russell*, 125 Wn.2d at 87; *State v. Lindsay*, 180 Wn.2d 423, 431, 326 P.3d 125 (2014). The prosecutor is also entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

During closing argument, defense counsel argued that the State had not met its burden of proof because P.L.'s injuries were not substantial, stating the following:

But what the State wants to put on here is that she may have been knocked silly for a split second, and later it caused her to have headaches and she had some sort of sensitivity to light and/or sound.

Now, if you think that's a substantial loss of your brain, a function of your brain, the defense would submit it's not substantial. Given – if you think about all the things your brain does, that's a pretty minor, little, tiny thing, and the reason that's important is because when you compare this instruction to what it seems to be talking about – and you can talk among yourselves and think about it – is what are they really talking about here that's a loss? And it would apply so easily to the kind of examples that I gave you.

And that's a really critical instruction because Mr. Sanders has admitted that he's responsible for the accident and he has admitted that the accident probably caused some sort of

injury. And you heard about the type of injuries. But you have to ask yourself, was this a substantial loss of the function of a bodily part or an organ? And the defense would submit that it is not, so he is guilty of everything up to but not completely enveloping any instruction that requires you to find that.

5RP 373-374.

In response, the State argued that P.L.'s concussion was substantial bodily injury stating the following:

Now, the second thing he talks a lot about is what is a substantial loss. And when you look at that injury instruction – I will just go ahead and close this because you don't need a view of a lighthouse.

When you look at that instruction, it says the function of the body part, and he went – or started talking about how the brain has millions of functions, and so therefore, then it's not a substantial loss, but that's not really the law.

The law is if you lose the function of the organ, and there can be multiple functions, but if a function of that organ is taken away, then that is substantial bodily harm.

And so we see this is a variety of things for her. These were all the before-and-after symptoms, right, that show that, yes, there was in a fact a concussion, and the concussion is a substantial bodily harm. And you see the effects in the loss of function of how her brain operates.

...

It doesn't matter that the brain has millions of other functions. If the function of the brain, whichever one of those functions we are talking about is impaired, that's a substantial bodily harm.

5RP 383-384, 386.

Defendant claims that the prosecutor misstated the law when he “repeatedly told the jury that any loss or impairment of *any* function of an organ automatically qualifies as substantial bodily harm.” Brief of Appellant at 11. This claim fails because the State never made such argument. At no point in trial did the State argue that *any* loss or impairment of *any* function automatically qualifies as substantial bodily harm. The record reflects that the State argued that P.L.’s concussion qualifies as substantial bodily harm. 5RP 383-384, 386. This was an accurate reflection of the law. *McKague*, 172 Wn.2d at 806-807. This argument was properly made in response to defense counsel’s argument that P.L.’s head injury did not qualify as substantial bodily harm. *Russell*, 125 Wn.2d at 87 (The prosecutor is entitled to make a fair response to the arguments of defense counsel.) Thus, the defendant fails to meet his burden of demonstrating that the State committed flagrant and ill-intentioned prosecutorial error.

- b. The defendant fails to meet his burden of showing prosecutorial error where the State’s PowerPoint regarding reasonable doubt were an accurate statement of the law and in accord with the jury instructions.

At trial, the jury was instructed the following with regard to reasonable doubt:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 25-65 (Jury Instruction No. 2)

The State's PowerPoint during closing argument explained reasonable doubt in accord with that jury instruction. CP 23-24 (Exhibit 17). The trial court approved the PowerPoint prior to closing argument stating, "I have also been over the State's closing PowerPoint... Three of the slides all relate to argument on reasonable doubt and what it means and doesn't mean. I don't really have a problem with them." 5RP 335. Defense counsel had no objection to the PowerPoint stating, "[t]hey sound okay to me, Your Honor...". 5RP 356.

During closing argument, the State argued the following:

And throughout all of these instructions, there is one thing you are going to see over and over and over again, and I will bet it's in there 12 or 15 times, and it's the phrase "beyond a reasonable doubt." Every time you're thinking about whether or not a fact has been proved, you have to ask yourself, *has it been proved beyond a reasonable doubt?* That's the critical factor in each of the elements... *it's absolutely critical that you ask yourself, has it been proved beyond a reasonable doubt, or do you have a reasonable doubt?*

5RP 381 (emphasis added).

The State's PowerPoint regarding reasonable doubt read as

follows:

Reasonable Doubt

- Burden, NOT a barrier
- Reasonable doubt DOES NOT MEAN no doubt
 - Does NOT mean beyond ANY doubt
 - Does NOT mean beyond ALL doubt
 - Does NOT mean to a 100% certainty
 - Does NOT mean beyond a shadow of a doubt
- Beyond a REASONABLE doubt

Reasonable Doubt

- THERE IS NO SUCH THING AS A PERFECT TRIAL
 - You could always find something else you wanted to see or something else you wanted to hear
- Question: Do you have enough?
 - NOT Do you wish you had more

Reasonable Doubt

- Must use reason
- Consider ALL the evidence as a whole
- ABIDING BELIEF???

 - Then you are satisfied beyond a reasonable doubt

CP 23-24 (Exhibit 17)

In *Anderson*, this Court held that the prosecutor's argument that a reasonable doubt arising from the lack of evidence "is simply a question of do you have enough" did not constitute prosecutorial misconduct as statements were accurate and were in accord with trial court's instructions. 153 Wn. App. 417, 430, 220 P.3d 417 (2009). Here, as in *Anderson*, the State's arguments regarding reasonable doubt were in accord with the law and the trial court's instructions. *Id.*

Defendant claims that the State's PowerPoint slide asking "Do you have enough?" minimized its burden of proof. Brief of Appellant at 14. Specifically, the defendant claims that the PowerPoint minimized the State's burden of proof because it "improperly encouraged the jury to convict [the defendant] if the State had made a mere *prima facie* case for each element." Brief of Appellant at 15. This claim fails where here, as in *Anderson*, the State's arguments were both legally accurate and in accord

with trial court's instructions to the jury. 153 Wn. App. 417, 430, 220 P.3d 417 (2009). The defendant's argument is neither supported by the record nor in law. The State never argued that the State need only prove a *prima facie* case. On the contrary, the record reflects that the State repeatedly emphasized that the burden of proof was *beyond a reasonable doubt* which requires an abiding belief in the truth of the charge. 5RP 389, CP 23-24 (Exhibit 17). There is no legal authority support defendant's claim that asking "do you have enough" constitutes prosecutorial error. On the contrary, *Anderson* held that asking "do you have enough" did not constitute prosecutorial misconduct. *Id.* Defendant's claim accordingly fails. As such, this Court should dismiss the defendant's claim and affirm his convictions.

3. DEFENDANT IS UNABLE TO SATISFY
EITHER PRONG OF THE **STRICKLAND** TEST
AND SHOW HE RECEIVED INEFFECTIVE
ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred.

Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case,

viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television. *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness

allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objections had been granted.

Kimmelman, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

“Substantial bodily harm” means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part. RCW 9A.04.110(4)(b).

Here, the jury was instructed that “[s]ubstantial bodily harm means bodily injury that involves a temporary but substantial loss of the function of any bodily part or organ. CP 25-65 (Court’s Instructions to the Jury No. 34). Defense counsel did not object to this instruction. 5RP 335.

Defendant argues that defense counsel was ineffective for not objecting to the jury instruction regarding substantial bodily injury. Brief

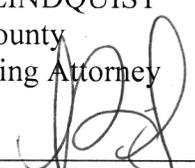
of Appellant at 18-19. Specifically, defendant argues that the jury instruction was improper because it excluded the language regarding disfigurement or fracture. Brief of Appellant at 19. This claim fails because no competent attorney would request a jury instruction that would allow for the jury to convict their client in more ways than necessary. Had defense counsel objected and asked for the full definition of substantial bodily injury would have given the jury two more ways to find that the defendant assaulted P.L. Defendant is unable to show his defense counsel was ineffective for failing to object when no competent attorney would have done so. Further, when the defense attorney's performance is viewed in the record as a whole, it is apparent that defendant did not receive ineffective assistance of counsel. Defendant is unable to meet his burden of showing defense counsel's performance was deficient and that he was prejudiced by such a deficiency. As such, the State asks that this Court dismiss the defendant's claim and affirm his convictions.

D. CONCLUSION.

For the foregoing reasons, the State asks that this Court dismiss the defendant's claims and affirm his convictions.

DATED: July 25, 2018.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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Deputy Prosecuting Attorney
WSB # 47838

Certificate of Service:

The undersigned certifies that on this day she delivered by *File* ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/25/18
Date


Signature

PIERCE COUNTY PROSECUTING ATTORNEY

July 25, 2018 - 1:04 PM

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